UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Alexis Scott-Ortiz,	)	
	)	No. **CV-20-238-PHX-DWL**
Plaintiff,	)	
	)	
vs.	)	Phoenix, Arizona
	)	November 17, 2020
CBRE Incorporated,	)	3:00 p.m.
	)	
Defendant.	)	
_____	)	

BEFORE: THE HONORABLE DOMINIC W. LANZA, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONIC MOTION HEARING

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

T E L E P H O N I C
A P P E A R A N C E S

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(Proceedings begin at 3:00 p.m.)

THE CLERK: Civil case 20-238, Alexis Scott-Ortiz versus CBRE Incorporated. Time set for telephonic motion hearing regarding defendant's motion to dismiss and compel arbitration and plaintiff's motion to stay. 15:00:33

Counsel, please announce your presence for the record, starting with plaintiff's counsel.

MR. BONNETT: This is Dan Bonnett speaking. Good afternoon, Your Honor. This is Daniel Bonnett and Jennifer Murphey appearing on behalf of the plaintiff. 15:00:47

MR. HENDRICKS: Good afternoon, Your Honor, my name is R.J. Hendricks with Morgan Lewis & Bockius on behalf of CBRE.

MR. BROCKELMAN: And this is Kent Brockelman, also on behalf of defendant CBRE.

THE COURT: All right. Good afternoon everybody. 15:01:01

This is the time for the motion hearing. As was mentioned a moment ago, CBRE filed a motion to dismiss and compel arbitration at docket number 18. Mr. Scott-Ortiz opposes that motion, and also has requested a stay, which is at docket number 23. 15:01:21

And as the parties are aware, on November 10th, after soliciting some more information about the status of the EEOC investigation, the Court issued a tentative order resolving both of those motions.

So hopefully everybody has a sense of where I'm 15:01:35

tentatively coming at these issues.

I think the way I would like to have the argument go is to start with Mr. Bonnett. Both sides are movants here, but because the tentative largely comes out in favor of CBRE on a lot of the issues, I think it makes sense to go that way. 15:01:54

So I'll start first with you, Mr. Bonnett.

MR. BONNETT: Thank you, Your Honor. This is Dan Bonnett speaking.

Having read the Court's tentative ruling, I would like to focus on two main issues for purposes of the argument this afternoon. And I think probably the easiest one to begin with, or certainly the most significant one to begin with from the plaintiff's perspective would be the issue regarding the enforceability of the arbitration language. 15:02:07

And I'm not going to argue the substantive unconscionability portion of our argument on that issue, because I clearly understand where the Court is coming from. However, I would like to try to perhaps elucidate a little bit more the plaintiff's position on the procedural unconscionability argument, and talk a little bit about *Cooper* -- the case that we cite, *Cooper versus QC Financial Services Inc.*, and why we think that that provides a roadmap for analyzing plaintiff's argument on a procedural unconscionability issue and why we think the Court can find on the basis of the strength of this record that the arbitration 15:02:29 15:02:50 15:03:14

language in the 2016 offer letter is, in fact -- and the entering into that offer, rather, is procedurally unconscionable on the facts.

As *Cooper* points out, that analysis begins with looking at the atmosphere surrounding the signing of the contract and taking into consideration the various unique facts that are presented by in this case Mr. Scott-Ortiz, into why procedural unconscionability should be found here. 15:03:38

And looking at *Cooper*, it talks about looking at various things such as the age, education, intelligence, business acumen, experience and the relative bargaining power, which are all laid out in Mr. Ortiz' declaration. 15:04:04

I may just truncate his name and call him Mr. Ortiz. I do that when I'm meeting with him.

So the notion here in terms of where Mr. Ortiz was coming from I think is worth talking about in terms of where he was, both financially, psychologically and in reality with regard to his return to work in August of 2016. 15:04:25

As his declaration points out, he had been out of work for seven months. He was experiencing substantial financial hardship. He needed to start working immediately. And coincidentally, the hiring manager for CBRE, Mr. Jeffrey Hawks, told him that he needed Mr. Ortiz to start working immediately, but he couldn't start until the uniforms were ordered. 15:04:52

So the offer letter that Mr. Hawks told Mr. Ortiz 15:05:17

would be coming was sort of a necessity, if you will, for actually starting work. And given the financial situation and the circumstances that confronted Mr. Ortiz, as he lays out in his declaration, he signed the offer letter so he could start work. 15:05:41

He went on to explain that he was told by Mr. Hawks he had two options, either accept or reject the offer letter through the online portal that he was directed to. And that those were the only two choices that he had, either to accept or reject. 15:05:59

So as his declaration points out, he accepted on the day that he received the offer letter, called up Mr. Hawks and told him he had completed the steps that he been directed to complete so he could start working. And it was confirmed that the uniforms could be ordered and Mr. Ortiz then was cleared to start working. 15:06:15

So the significance, we believe, in terms of those events establish the exigency of the situation that Mr. Ortiz found himself in, what he was told he needed to do to start working, the reason he needed to start working, and the fact that he was not provided an opportunity to bargain over the terms and conditions of his offer, including the language of the arbitration. 15:06:41

In fact, as the Court references in the tentative ruling, was told that -- he mentioned that he didn't even know 15:07:01

what arbitration was. He wasn't aware of it, he had no idea, even if he had read that section of the agreement, what it would have meant to him.

So those facts seem to parallel pretty closely the facts that are laid out in *Cooper*. 15:07:19

And what's interesting -- and I went back and reread *Cooper* with a more critical eye after reading the Court's tentative ruling. And what's significant, and I think perhaps needs to be examined perhaps a little more carefully in terms of the takeaway from *Cooper,* while it is clear that the 15:07:42 plaintiff in that case was directed to go to arbitration, and arbitration was compelled, that was a 19 -- I'm sorry, a 2007 case.

And Judge Zapata went through an analysis stating that -- and finding specifically that the procedural 15:08:09 unconscionability existed. However, he points out that the plaintiff in that case argued both procedural and substantive unconscionability, and didn't make an argument that procedural unconscionability alone would be a sufficient defense to preclude the enforcement of an arbitration agreement. 15:08:33

And the judge even discussed at that point in time there wasn't a clear indication in Arizona that procedural unconscionability alone would be sufficient. There was a reference to the *Maxwell* case, the Supreme Court case, that concluded that substantive unconscionability alone would be 15:08:56

sufficient, but not specifically mentioning and finding or holding that procedural unconscionability alone would be a sufficient defense, although recognizing that there were other jurisdictions that had reached that conclusion.

Subsequently, in 2014 the Division One of the Arizona Court of Appeals in the *Duenas* case that we cite at document 23, which is our opposition, at pages 10 through 11, the *Duenas* case did make the conclusion and did come to the conclusion, citing *Maxwell*, that either doctrine of procedural or substantive unconscionability standing alone would be a defense to enforceability of an arbitration agreement. 15:09:16 15:09:42

And then three years after that the Division Two of the Court of Appeals in the *Gullett on behalf of the Estate of Gullett versus Kindred Nursing Centers* case, cited at page 9 of our opposition, cited *Duenas*, and also reached the same conclusion that the claims of substantive or procedural unconscionability are independent defenses to enforceability. 15:10:06

So the question that I have in my mind is whether Judge Zapata would have reached the same result in *Cooper* having had the benefit of the decisions in *Duenas* and the *Kindred Nursing Centers* case. 15:10:31

And it would appear, based on a finding of procedural unconscionability alone, the result may have been different. The reason arbitration was compelled there was because the conclusion was that procedural unconscionability standing alone 15:10:49

was insufficient. And then the substantive unconscionable provisions of the agreement regarding the class action waivers could be severed from the arbitration agreement, leaving the remainder of the document and the arbitration provisions not unconscionable substantively. 15:11:13

So the argument that Mr. Ortiz is making here is is that given in the totality of the circumstances that were unique to him, that were presented to him -- which by the way I would point out were not contradicted by a converting declaration from Mr. Hawks, or for that matter anyone else from 15:11:31 CBRE in terms of what his state of mind was, what he understood his position to be -- that those provisions, given the standard that's applied, similar to that at summary judgment, must be construed in the light most favorable to Mr. Ortiz.

So our argument, Your Honor, in summary, with regard 15:11:55 to the enforceability of the 2016, and for that matter that would arguably be the same in 2015, but for the arguments we've made, that shouldn't apply because the claims didn't arise during that period of time.

And *Duenas* talked specifically about subsequent 15:12:12 arbitration agreements arising after the fact under Arizona law are not enforceable for subsequent events.

But the sum and substance of it is that in construing this in the light most favorable to Mr. Ortiz, we believe we've met our burden on the procedural unconscionability issue. And 15:12:33

for that reason should -- it should be found not to be enforceable and arbitration should not be compelled.

If the Court would like for me to speak briefly to the motion to stay, I have just a couple of summary comments to make on there that are not as detailed as the ones I just made on the unconscionability argument. 15:12:55

THE COURT: Let's pause on unconscionability.

I understand your point about *Cooper*, but one of the cases that is cited on the tentative on the page before that is the *Underwood versus Chapman Bell Road* case. And that case seems to me an even better analog than *Cooper*. 15:13:10

There was an employee, it was in the employment context, also the plaintiff in that case had a limited education, not much business experience. In that one the plaintiff arguably had even less time to examine the contract or the arbitration clause than Mr. Scott-Ortiz did, because the case states that it was given to the employee in the middle of the day, in the middle of a busy work day to sign, and the person didn't even know what arbitration was. 15:13:31

But in that case Judge Campbell rejected the procedural unconscionability challenge, and one of the things he focused on was, arbitration clauses are pretty typical in employment contracts. 15:13:48

And I'll give you a chance to respond in a second, but just kind of where I'm thinking is, to me it's notable that 15:14:07

Cooper wasn't an employment case. It had to do with a payday lending situation and changing the terms of this loan agreement.

The reason I mention that is because some of the other cases that are discussed in the tentative is also Judge Campbell's order in the *Edwards* case where it talks generally about procedural unconscionability. It doesn't really turn on whether one party had bargaining powers, going through a rough patch or things like that. Fundamentally, even if they don't agree with what's in the agreement -- or don't understand it, the agreement may be enforceable if it's consistent with reasonable expectations and not unduly oppressive. 15:14:20 15:14:40

And that concept of consistent with reasonable expectations is something that I thought a lot about before coming out with this tentative, because it just seemed to me when looking at the case law that time and time and time again courts have found that in the employment context arbitration clauses in the employment contract between the employer and the employee are pretty standard. 15:14:53 15:15:11

And given their ubiquity, that really makes it an uphill climb for a plaintiff trying to mount a procedural unconscionability challenge in the employment context just because it's hard to say any particular employee was unfairly duped when these things are so standard. 15:15:28

And so can you talk about that and why your case should lead to a different outcome than what happened in the *Underwood* case?

MR. BONNETT: Sure, Your Honor. This is Dan Bonnett. Yes, thank you. 15:15:45

I think that the one point here that I would say probably distinguishes the two cases that Your Honor just mentioned is that here the mechanics of how this was presented to Mr. Ortiz, and sort of the steps that he went through, need to be analyzed in the context of what was going on with him 15:16:07 personally, essentially how he viewed this.

Although he didn't say it, I'm paraphrasing, he basically was being thrown a financial life preserver here by CBRE because he was seven months out of work and suffering from what he described as a substantial financial hardship. 15:16:27

So the bargaining process here still is one that needs to be examined in the context of whether there was a true meeting of the minds in terms of understanding what was going to be expected of him in the context of accepting the offer of employment, and understanding that he was going to be subject 15:16:52 to an arbitration agreement under these conditions where he was told he needed to be available immediately. Mr. Hawks needed him right away. That in order for that to happen he had to order a uniform, the uniforms couldn't be ordered until he went online and clicked accept on the offer. And he did that. And 15:17:13

he did that because he needed the work.

So understanding that there some actual conscious meeting of the minds here is what I think distinguishes this case from the other two cases that were cited, because there wasn't a hard document put down in front of him and he wasn't told, take your time, get this back to me by the end of the day, let me know -- if you have any questions about arbitration, Alexis, let me know what they are. 15:17:37

There is a reference in the offer letter that if you have questions about the offer letter contact -- contact or you can call this number. But that doesn't overshadow the circumstances that he was confronted with personally, and what was being told to him by Mr. Hawks about the need to get somebody in. 15:17:55

We don't know, because there's been no controverting evidence presented by the defendants, why Mr. Hawks needed him there immediately. We don't know if Mr. Hawks was under pressure from his supervisors to get somebody hired and get them in there. But certainly that was what Mr. Ortiz took away from the conversation, is there was an immediate need on the part of both parties to get this done quickly, and as quickly as possible so that he could get in there and start working. 15:18:16 15:18:35

And that wasn't a benefit apparently just to Mr. Ortiz, it was one equally to the defendant here.

So looking again at all of the cases that talk about 15:18:55

looking at the totality of the circumstances, we think it's distinguishable for that reason.

And I don't know if I completely answered Your Honor's question, but I think that's what makes this case different.

THE COURT: I think I understand your position. 15:19:09

The final question I have is, isn't it relevant here -- this isn't something that is really brought out in the tentative, but is it relevant at all and doesn't it hurt your position that this wasn't the first time that Mr. Scott-Ortiz reviewed and then signed a contract that had an arbitration 15:19:29 agreement? He also did it in 2013. Doesn't that kind of hurt your position that this is the type of agreement that is not consistent with the reasonable expectations and it was unfairly sprung on him?

MR. BONNETT: It may have some bearing on -- candidly 15:19:48 on the issue of credibility. But I think, again, he explains in his declaration, and there's no -- there's no evidence that has been presented at this point to the contrary, that he didn't know what arbitration means.

I would have to say that many folks, including 15:20:10 myself -- and this is not an excuse, it's just a reality -- don't read some of these things. When I download a new app on my phone and it has eight pages of stuff I'm supposed to read and accept, it just doesn't happen.

And I think that was the case for Mr. Ortiz. And 15:20:31

that's why things like age, educational experience, business acumen, prior familiarity with the type of work he did as a laborer, a mechanical and manual laborer, is different perhaps from somebody that's maybe an office administrator whose job is to read documents daily, or whose part of their responsibility is to take the time and parse language in papers that come across their desk. But that wasn't this plaintiff. 15:20:54

THE COURT: All right. I don't have anymore questions concerning procedural unconscionability, if you want to turn to the stay. 15:21:13

MR. BONNETT: Thank you, Your Honor.

Again, I don't want to rehash what's already been briefed and what has -- or the takeaways I have from your tentative ruling. I do think, however, that one of the things that the plaintiff is concerned about if this goes to arbitration is the ability to ensure that the arbitrator appreciates the significance of the EEOC process, what a favorable cause determination ruling may have in the context of his claims, and the admissibility of that document. 15:21:27

And while the arbitrator certainly has discretion to consider all those things, there's nothing to ensure how that discretion would be exercised, or an ability to have it reviewed for an abuse of discretion. 15:21:57

That, frankly, is one of the things that was pointed out in the *Marie versus Allied Home Mortgage* case we cite in 15:22:16

our reply at document 25, at page 6, that while the arbitrator has broad discretion whether to grant a stay, as the Court suggests, or consider these other factors, there's no possibility of review, and there's no assurance that what the defendant's position would be with regard to a stay that's made before the arbitrator at that time. 15:22:43

And on the balance of the factors that are considered with regard to whether a stay should be granted or not, while the defendants address most of the arguments that we raise, I don't believe they did, or if they have I overlooked it, any showing of hardship to CBRE by granting a stay while the EEOC conducts and completes its investigation. 15:23:03

THE COURT: And just to follow up on that, this was one that I'm frankly pretty torn on, because I think there are all sorts of reasons why it would be helpful for the administration of justice in having a fair outcome for everybody in this case to hit the pause button, sort of effectively, before it gets to arbitration, to make sure that all of his remedies are preserved. 15:23:25

The thing that I'm just struggled with is when you look at the actual text of the FAA, if I can just paraphrase it, it's -- a District Court's role is really limited in a case involving a valid arbitration agreement. You need to look to see if there is an agreement to arbitrate, and if there is, you got to send them to arbitrate. 15:23:45 15:24:06

So what I'm struggling with is, I recognize that some other courts have issued stays in this circumstance, but I'm struggling to see how that approach is consistent with the text of the FAA, which really seems like, once I find there's an enforceable arbitration agreement, I shall grant the -- issue the order compelling arbitration, because that's what my limited role is to do. 15:24:23

MR. BONNETT: This is Dan Bonnett, Your Honor.

I understand that. I guess I too am struggling with the notion of the jurisdiction of the Court to control its docket in the manner in which its cases proceed, and the overriding desire that all litigants and courts have to ensure that justice is appropriately administered, and that actions taken are not unduly prejudicial to any of the litigants. 15:24:43

And I think the cases we point out here have explained what the potential harm is to Mr. Ortiz by not letting the EEOC process play itself out. 15:25:13

And although I have not found a case that suggests or expressly holds that there's a balancing test that should be employed here, I think it's within the inherent authority of the Court to do that, and under these circumstances, to stay the case without prejudice to any of the parties for the reasons that we've cited. And I think most of those were addressed in our reply memorandum. 15:25:37

THE COURT: All right. Thank you. 15:25:56

Do you have anything else you'd like to address before I turn to CBRE?

MR. BONNETT: I do not, Your Honor. Thank you.

THE COURT: All right. Thank you.

MR. HENDRICKS: Your Honor, R.J. Hendricks with Morgan Lewis on behalf of CBRE. 15:26:06

Let me address the issue of unconscionability first and the issue of procedural unconscionability.

I think Your Honor is correct, even if we take plaintiff's suggestion that you look at the particular facts involved in this case to make that particular judgment, the fact is is that Mr. Scott-Ortiz was a high school graduate. He has taken some college courses. He's not 18, 19, he's in his thirties. He's an adult. 15:26:26

He actually logged into the system, which required him to process what was being presented to him in terms of entering his password, navigating through the system. He had no difficulty with respect to that. 15:26:44

And despite all of what we would characterize as self-serving sort of statements now, the offer letter is not some sort of offer letter or a legal document, as the Court points out, in the context of a loan agreement or a payday loan sort of service. It is a routine agreement arising in the context of employment, an employment relationship. 15:27:03

It is absolutely critical that this was not the first 15:27:24

time that he had done that. And so there's -- there is a pattern and a course of dealing here where CBRE is being perfectly predictable in what's being expected.

During the last period of his employment he had an arbitration agreement. He had to agree to that. He did so. 15:27:43
He signed it. In this phase of his employment agreement, as his employment, he had an arbitration agreement. There was an offer that was sent. He read it. He logged in, he signed it, accepted its terms.

And I want to be clear about what was stated in the 15:27:56
offer letter. He said, oh, gee, I was forced to do this. There's no indication of any sort of compulsion or forcing by CBRE. There's no indication that CBRE dictated when he logged into the system, and when he read it and when he acknowledged it. And in the offer letter it states, if you have any 15:28:16
questions, please do not hesitate to contract your hiring manager, and it gives a phone number, and it also says, "or Jeffrey Hawks at CBRE.com."

So he was directed back to the very person he had the conversation with, Mr. Hawks. And he could have at any point 15:28:31
said, you know, what is this arbitration thing I see here? I don't remember seeing that before. Could you explain to me what that is? I don't think I want to do that. Do you think I could do something else?

He had the opportunity. That opportunity was 15:28:45

presented to him. And that's another distinguishing factor here.

The fact is is that everything that CBRE did with respect to this is consistent with reasonable expectations. It is an employment arbitration agreement that Mr. Scott-Ortiz is presumed to have read and understood the agreement by signing it. He's an adult. He has the ability to enter into binding contracts. 15:28:57

This Court should not invite the invitation of plaintiff's counsel to treat Mr. Scott-Ortiz as a child who lacks capacity. He has capacity. And on two occasions back in 2013 and in 2016 he signed valid, binding agreements, arbitration agreements. 15:29:15

So there is no inference whatsoever that he was surprised by this, that CBRE in some fashion took advantage of him with respect to the agreement, that in fact he was denied the opportunity to ask questions. He was invited to ask questions. This is not some sort of 18-page agreement in small font. This is an agreement that specifically set out in a distinct section the arbitration provision, and he agreed to it. 15:29:33 15:29:51

So we appreciate the notion of looking at the particular facts. We think that if you do that, the facts as presented are consistent with the tentative ruling. There was no procedural unconscionability. 15:30:07

And the move of the case law does not turn every arbitration sort of motion into such an individualized process where basically people who sign these agreements can come back after the fact, assert self-serving information, not really pointing out any sort of oppression or abuse by the employer, but things that are in their mind, gee, I needed a job badly, gee, I didn't read it. That's a self-serving statement. He acknowledged having read it. He acknowledged and agreed to the agreement. 15:30:30

So the thrust of the case law is to enforce these. CBRE's agreements have been enforced in the past. And the particular facts of this situation support enforcement, that this -- there was no surprise, and there was no procedural unconscionability. 15:30:47

Now, as to the issue of the stay -- 15:31:03

THE COURT: Let me just -- let me just pause you right there because I have just a little bit to follow up on.

So you used the phrase self-serving several times. I understand that that's your position on his factual statements about what he was going through when he signed the agreement. 15:31:21

But don't I need to resolve all the disputed facts in his favor, given the standard of review here?

Litigant's statements are self-serving all the time, but there's no rule that I'm aware of that the Court automatically rejects a litigant's self-serving statement 15:31:39

irrespective of the standard of review or the posture of the case.

MR. HENDRICKS: I don't think that you reject them, and I don't mean to suggest that by my statement. I think even if you include them, even if you consider them, which I understood the Court to have done in reaching its tentative, those statements were not enough. 15:31:53

I do think that, just looking at where the case law is going -- and when you speak to this issue of consistent with reasonable expectations, that is taking the standard to a more objective notion as opposed to a purely subjective notion. And it's talking about, you know, whatever facts you present, they need to be something very extraordinary to meet the high burden. And we cite the cases that speak to that, of not enforcing an arbitration agreement. 15:32:09 15:32:31

So that's the only point that I make. And that is that, yeah, consider all of the objective facts, the facts that an arbitration agreement was presented. You can include his individual circumstances, but as the Court noted in the tentative, those sort of particular characteristics, you know, are not really either controlling. 15:32:47

Here you have an agreement that was presented to him. He was given an opportunity to read it. In this particular context, this was the second arbitration agreement he had. He had one back in 2013 when he was initially 15:33:03

employed. And then when he reapplied for a new position, there was another.

Those are very specific objective facts that go to this notion that this is not a surprise. And the agreement is fundamentally the same in 2016 as it was in 2013. There was really only one change, as the Court pointed out to, and that is it speaks to the FAA controlling versus the local state's arbitration rules controlling. That's the only difference. 15:33:21

So we understand that those facts can be considered, but I don't believe that the case law would deem those facts as being dispositive. I think, in fact, the trend of the case law is that they are not. What's dispositive is, he was given the agreement, he had an opportunity to review the agreement, he in fact went into an electronic system that caused him to take affirmative actions indicating that he was signing in, it's him, that he's reviewed it, that he agrees with it. 15:33:40 15:33:57

And another critical particular fact in this case is the offer letter did specifically say, if you have any questions, go back and talk to your hiring manager.

So all of these statements about what the hiring manager said and what he didn't understand, to the extent any of that was inconsistent, he was given a further opportunity to go back and clarify with that hiring manager exactly what this was all about. 15:34:13

And by his own -- there's a lack of any indication in 15:34:26

his declaration that he went back and asked those questions. In fact, his declaration creates the impression that he didn't take advantage of that opportunity.

So when I say self-serving, I'm saying, well, when given the opportunity to ask those questions in real time, 15:34:44
having the opportunity to review the document, having apparently not done so, to come back now and say, well, the fact that I didn't do so or I had a particular understanding, you know, again, we don't believe that that should control the outcome here. 15:34:58

The objective facts here support that this was not a surprise, he was not procedurally unconscionable, and this agreement is enforceable.

And there's not been a presentation of specific facts that meet that high hurdle of demonstrating true unfairness, 15:35:13
true surprise on the part of the plaintiff.

THE COURT: All right. Thank you.

MR. HENDRICKS: So with respect to the issue of the stay, again, our -- we agree with the Court in its assessment that the FAA creates a very narrow framework here. This Court 15:35:33
is asked under the FAA to determine whether or not we have a valid agreement to arbitrate. And if we do, whether the agreement encompasses the dispute.

There's no disagreement here that the agreement encompasses the dispute. And we believe the Court's correct 15:35:53

with respect to it being a valid agreement.

Under those circumstances, pursuant to the FAA, the Court shall compel arbitration.

At this juncture, again, we argue that the Court should dismiss for lack of jurisdiction. We're fine with the Court's distinction of compelling the arbitration and staying the case pending resolution of the arbitration. 15:36:08

But, again, the notion that we would even stay the initiation of the arbitration would fundamentally deny us the benefit, and it could be reversed in some other circumstance, deny the parties the benefit of its bargain. The intent of arbitration is to be efficient, is to be relatively quick. 15:36:32

Here the EEOC has had a charge for some time. It's not concluded its investigation. Despite the suggestion that it might be a favorable outcome, there's no assurance as to that at all. We believe that the outcome would be favorable to us. 15:36:51

But even if it's not, the point is is that we should not be in a position of waiting an indefinite period of time for a third-party agency to conduct its initial investigation, which may or may not have particular bearing on resolving this particular dispute before us. 15:37:06

You know, the reality of it is is that we could resolve Mr. Scott-Ortiz's dispute and the agency could still, for whatever reasons it has, pursue other sorts of issues or 15:37:27

not.

So in the notion -- in the context of this case, where we have a valid agreement, where the claims could fall within it, in terms of this Court's function under the FAA, it should pursuant to that compel arbitration. 15:37:44

All of the arguments that plaintiff wants to make with respect to the management of the arbitration, the timing and sequence of how things are litigated, whether there is a stay of the arbitration itself, those things can be addressed with the arbitrator. 15:38:03

And the suggestion that plaintiff wants a guarantee of the stay, that's putting sort of the thumb on the scale in the sense that plaintiff's not guaranteed any particular outcome. And the fact that in this instance, by virtue of his agreement, it will be an arbitrator that makes that scheduling decision 15:38:22 versus the Court, well, that's the natural outcome of being a part of arbitration. Arbitrators set their arbitration schedule, and there will be a whole scheduling order, and all of these arguments can be addressed there.

The plaintiff is not deprived of the ability to 15:38:37 advocate a request for a stay. He's not being deprived of his ability to even obtain a stay through the arbitration process. If we delay for an indefinite period of time, employees come and go, people's memories fade. There are a whole host of things that can change in the record, and we're being denied 15:38:57

the fundamental benefit of arbitration, which is a relatively quick, expeditious, concise sort of process.

So we believe the case law supports the position of the Court here, its tentative, that the initiation of arbitration should be compelled, and that any sort of stay of those proceedings should be done by the arbitrator. 15:39:13

In terms of the civil case, the Court can stay that pending resolution of the arbitration. And we think that would harmonize and be perfectly consistent with the requirements of the FAA. 15:39:32

THE COURT: All right. Just a question on that stay point.

Do you think -- do you think that I have discretion to stay my issuance of the order compelling arbitration, but I should decline to exercise that discretion and send everybody to arbitration right away, or is it your position that I don't even have discretion to do that, and it's mandatory that I send the parties to arbitration now, and I have no say in the matter? 15:39:46

MR. HENDRICKS: Our position is is that it's mandatory and the Court does not have that discretion -- 15:40:02

THE COURT: All right.

MR. HENDRICKS: -- under the FAA.

THE COURT: So the cases that Mr. Scott-Ortiz has cited in his motion, where other courts have considered stay 15:40:13

requests, is it your position that all those courts got it wrong when they considered staying actions for the types of reasons that are being discussed here?

MR. HENDRICKS: My memory of it is that those cases did not involve the same pattern. I mean, in the generic sense the Court has generically authority to stay cases generally. But my memory of the cases that he cited, arbitration had not been initiated, and it wasn't a situation where arbitration -- the court was staying arbitration. 15:40:29

You might have cases where the court directs arbitration and is staying further proceedings in the civil case pending the resolution of that. But I candidly don't recall seeing a case cited that -- where arbitration -- where a court concluded there was a valid arbitration agreement that covered a claim and it nonetheless stayed the case for some other -- for some other reason. That's not my memory of the cases. 15:40:47 15:41:06

If I'm remembering them incorrectly, I apologize for that, but that's not my memory of the authorities.

THE COURT: Okay. Thank you. 15:41:22

Is there anything else you'd like to address?

MR. HENDRICKS: The only thing I would address is, even if it were discretionary, again, on the equities, I don't believe -- which I don't believe that it is, but even if it were, I don't believe on these equities that that would be 15:41:35

warranted.

Mr. Scott-Ortiz filed his case. He initiated the litigation. That's a choice that he made. It implicated the rights under the arbitration agreement. We should be able to benefit from those rights and have arbitration begin. If that's not the case, then we're being denied the very benefit of an expeditious sort of arbitral resolution of the claim here. 15:41:51

And both parties can argue their respective positions as to whether a stay should occur with the arbitrator. 15:42:12

So in terms of balancing the equities, even if there were discretion, given that there is a valid arbitration agreement, given that it covers the scope of these claims, that decision should be a part of the arbitration process on the equities as compared to the court system. Especially when dealing with an indefinite administrative process with the EEOC on claims that are currently not even before the EEOC. These are his Section 1981 claims, these are not Title VII claims. 15:42:29

So that would be our position there. 15:42:46

THE COURT: All right. Thank you.

All right. Mr. Bonnett, final word.

MR. BONNETT: Thank you, Your Honor.

A couple of things that counsel said that I'd like to just respond to or reply to. 15:42:58

First of all, regardless of what the arguments are with regard to the expectancy of CBRE to move forward quickly to resolve the Section 1981 claim, the Title VII claim is still out there. And however long it takes the EEOC to complete its investigation and either issue a notice of right to sue or initiate its own enforcement action in the name of the EEOC against CBRE, they're going to have to litigate that issue at some point in time. 15:43:20

So I think it's a bit of a red herring to argue that there's some prejudice here that works to the disadvantage of CBRE by not -- simply by not moving the arbitration forward if on balance there are reasons not to do that. 15:43:39

Secondly, with regard to what to expect from the arbitrator, none of us have a crystal ball what the arbitrator will do if the arbitrator is asked to stay. But I think we all are educated enough to realize that arbitrators get paid because of the work they do. They don't get paid if they're not working. 15:44:03

So I don't know who the arbitrator would be, and none of us know who that would be. But certainly I don't think it's beyond the pale to envision that there's certainly a monetary incentive for the arbitrator to want to move ahead with the arbitration as opposed to not moving ahead with the arbitration. And that's one of the concerns that factors into, I think, the conclusion that the First Circuit reached in the 15:44:19 15:44:38

Marie case that we cited. And certainly all of the cases that we cited in our reply where courts that have exercised the discretion to enjoin arbitration are set out on page 3 of our reply. I don't need to repeat all of those for the benefit of the Court or counsel. 15:45:00

Counsel also made a couple statements that I just want to make sure that I didn't misunderstand what was being said. But to the extent what was said was that Mr. Ortiz agreed with the arbitration language, I don't think there's anything that I've seen in the record that says he agreed to it. I think at 15:45:19 best the argument is that he accepted the offer letter. But to imply that he consciously agreed to arbitrate I think misstates the record.

Also I'm a little bit concerned about the conflating the argument here of employing some sort of an objective 15:45:39 standard rather than a subjective standard. I don't think that's what the cases stand for. And to the extent an objective standard is applied, it suggests that the Court engage in some sort of credibility determination and weighing of evidence, which the Ninth Circuit has repeatedly said is not 15:46:03 appropriate at the summary judgment stage. And that's the standard that applies for purposes of determining the issues that is before this Court now, we would advocate that equally that's not the appropriate standard. You have to look at specific facts and resolve them to the extent they can be 15:46:24

credibly -- to the extent they can be resolved. And when in doubt that doubt has to be construed in the light most favorable to Mr. Ortiz.

And finally, the argument that he could log on to and go through the portal to access and click on accept on the computer is also a bit of a red herring. My six-year-old nieces can log on a computer and navigate some things. But when they get to the end of whatever it is they're looking at, my guess is if it was the offer letter in front of them, they wouldn't understand what the arbitration agreement meant even if they read it. 15:46:46 15:47:10

So I just sort of think, again, the important factor here to look at is the totality of the facts as the Arizona state cases suggest are to be taken into consideration in determining whether or not there was a meeting of the minds. And for the reasons we've stated, we just don't think that that's the case here. 15:47:32

THE COURT: All right. Well, thank you very much to all the parties for their arguments here today.

I will be taking this under advisement. I've got a lot to think about based on what everybody's said here in the hearing today. But I hope to finalize the order relatively soon, I hope in the next week or so, and get it out. 15:47:48

And so with that, unless the parties have anything else they'd like to raise today, this hearing is adjourned. 15:48:06

Thank you.

MR. HENDRICKS: Thank you, Your Honor.

MR. BONNETT: Thank you, Your Honor.

(Proceedings concluded at 3:48 p.m.)

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C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 22nd day of December, 2020.

s/Candy L. Potter
Candy L. Potter, RMR, CRR